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FEDERAL COMMUNICATIONS COMMISSION
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Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

In the Matter of)

Revision of Part 22 and Part 90 of the)
Commission's Rules to Facilitate Future)
Development of Paging Systems)

WT Docket No. 96-18

Implementation of Section 309(j))
of the Communications Act --)
Competitive Bidding)

PP Docket No. 93-253

TO: Chief, Wireless Telecommunications Bureau

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**Initial Comments Of
Diamond Page Partnerships,
AmericaOne and Affiliated Entities
in
Phase 1 Issues**

These Initial Comments, filed by Diamond Page Partnerships, AmericaOne, and affiliated entities (collectively the "Filers") address the phase 1, or processing issues raised by the above-captioned Notice of Proposed Rule Making, FCC 96-52, rel. February 9, 1996 ("Notice"). Filers, each of which is a start-up entity, have affiliated with each other for the purpose of establishing a virtual nationwide PCP paging network, operating on exclusive channels in the 929 MHz band. Some 128 licenses have already been granted to Filers, and some 143 applications remain in pending status.

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1. In General

The Notice proposes major changes in the regulatory scheme for CCP and PCP paging, including the adoption of geographic licensing and auction techniques pursuant to section 309(j) of the Communications Act for the further processing of certain paging applications. The Notice also announces a freeze on the filing of further applications under the existing rules but proposes to continue to process non-mutually exclusive 929 MHz PCP applications (par. 147) and notes that applications seeking exclusivity under section 90.495 are generally considered to fall into this category.

Filers strongly support the proposal to continue processing pending applications. They initially expected to acquire licenses in the aggregate for some 270 cities including every major city in the U.S. except for New York and Los Angeles and to serve a footprint with a total of 150 million population, relying on a series of exclusive licenses. A unique marketing plan for the provision of service to a segment of the paging market not yet being served has been developed. The costs of preparing, filing, and pursuing the requisite licenses and the organizational costs of a funding effort to raise not less than \$50 million have been already committed by the initial Filers. Specifically, they have expended in pursuit of this goal approximately \$1 million and are still in the process of capitalization and other development efforts. The Filers' plan for marketing a nationwide system is dependent on high volume with low incremental costs for additional infrastructure and marketing. Those factors, in turn, are contingent on the reliability of the Filers' expectations. Accordingly, when the Private Radio Bureau discontinued the processing of 929 MHz PCP applications last summer, Filers' plans were severely disrupted and it has proven impossible to date to adhere to the schedule initially contemplated by the affiliated entities. The Filers' scope and purpose was in keeping with

the Commission's expressed intention to encourage additional competition.

Unfortunately, no notice of this interim change in policy was provided and for many months it was not apparent that any such change had occurred. In the interim Filers continued to expend funds in pursuit of an operational and financial plan which, unbeknownst to them, was based on a regulatory structure in the process of fundamental revision.

Requests for slow-growth authority under section 90.496 of the rules were also part of the Filers' plans. The Commission's contemplation of a shift for 929 MHz PCP applications from the existing processing rules to new rules based on geographic licensing, longer build-out periods and auctioning of newly-filed applications, renders further slow-growth applications moot and the Notice indicates they will no longer be processed. Notice, par. 46.

Without commenting at this time on those proposals, Filers strongly urge the Commission to continue to process pending applications so as to maximize the possibility that Filers' plans for the contemplated nationwide system can be as far advanced as is possible pending the uncertainties of future auctions. Given the extent to which Filers have reasonably relied on the existing processing scheme and the substantial sums expended thereon, it is only appropriate that the Commission make every effort to proceed promptly with the processing of the pending applications. Similarly, given the vast change in the proposed treatment of 929 MHz PCP applicants, Filers urge the Commission to extend the currently applicable construction deadline of 12 months both for already-granted and for pending applications. Such an extension would provide additional time both for licensees and applicants to accommodate their plans to the Commission's substantive proposals. While the Commission may legally alter the

processing rules for pending applications, it is obliged to weigh the burdens borne by those adversely affected against the public interest advantages foreseen in the new rules. SEC v. Chenery Corp., 332 U.S. 194, 203 (1947); Retail, Wholesale & Dep't. Store Union v. NLRB, 466 F. 2d 380 (D.C. Cir 1972). Filers suggest that an additional six months for construction be permitted under both circumstances.

2. Specific Proposals

The Notice seeks continued growth in the paging industry while converting the licensing scheme to one based on geographic allocations awarded by auction. Notice, at par. 1. At the same time, the Notice seeks to allow incumbent licensees to continue to operate their businesses during the rulemaking in any manner which would not impair the Commission's desired objectives. Id. at pars. 139-140. To this end, Filers respectfully propose the following additional interim processing rules:

a) Unfettered Exchange of 900 MHz Paging Channels. The interim processing freeze does not apply to assignment or transfer-of-control applications. Id. at par. 139. However, the Notice fails to consider that the 929 MHz paging channels licensed under Part 90 and the 931 MHz paging channels licensed under Part 22 are subject to different assignment/transfer rules. In order to treat these substantially similar services equally in the interim (see id. at par. 8), the Commission immediately should conform its 929/931 Mhz paging assignment and transfer policies to those applying to 931 MHz authorizations.

Currently, Section 22.137 of the Rules permits construction permits for 931 MHz paging systems to be assigned or transferred freely, and does not require as a condition precedent that the system be constructed or operated for any period of time. Further, the Commission's policies encourage the swapping of 931 MHz paging channels between

licensees.¹ On the other hand, except for limited exceptions, 929 MHz licensees operating under Part 90 may not be able to assign or transfer their authorizations until the stations have been constructed.²

While these differing requirements might have had some historical justification at one time, since the adoption of the 1993 Budget Act the justification has been lost. Accordingly, the Commission's interim paging rules should permit the unfettered exchange of 929 Mhz and 931 Mhz authorizations (and associated exclusivity rights, if any) without regard to their construction status. Such exchanges will permit paging operators to better rationalize their existing systems across broad geographic areas without adversely affecting the Commission's ability to auction unlicensed areas.

b) De Minimis Relocation of Authorized 900 MHz Paging Stations. The Notice proposes that the Commission will process applications to relocate 929 MHz and 931 MHz paging stations only "if the licensee's interference contour is maintained." Notice at par. 140. The Commission should modify this policy slightly to provide the same degree of flexibility to start-up 900 MHz paging licensees as it does to entrenched, major 900 MHz paging operators and to paging licensees in other frequency bands. In other words, the interim policy should also be on a level playing field.

The problem arises because 900 MHz paging stations have a fixed interference contour, generally established without regard to the station's precise antenna height above

¹ See generally Revision of Part 22, 95 FCC 2d 769, 54 RR 2d 1661 (1983) (CC Docket No. 80-57), ¶107, subseq. history omitted; 931 MHz Paging, 89 FCC 2d 1337 (1982) (CC Docket No. 80-183), subseq. history omitted.

² See Third Report and Order, 9 FCC Rcd 7988, 8160 (1994).

average terrain ("HAAT") or effective radiated power ("ERP") in any direction.³ Thus, unless a licensee has a complete overlap of 931 MHz paging systems (which happens only to large carriers in major markets), the Commission's interim policy precludes the relocation of non-internal 900 MHz paging stations by any distance whatsoever. If the license were to relocate its site by 50 feet or so (for example, to move from one tower in an antenna farm to another), its predicted interference contour would expand in one direction by 50 feet.⁴ Thus, the Commission's proposed interim rules would preclude this relocation, even though the relocation would have no measurable electronic or legal significance.

The Commission's policy thus serves to preclude the development or expansion of existing 900 MHz paging systems. If site relocation is absolutely precluded, licensees will be unable to construct and will lose their licenses where the licensed site has become unavailable due to third-party causes, such as the destruction of the tower or a loss of available tower capacity which developed while the application was pending. Further, some site landlords likely will raise the site rentals to unconscionable or uneconomic levels for 900 MHz licensees, knowing that they have no alternative sites available.

³ See Section 22.537(f), Table E-2 (80.5 km interference contour for most 931 MHz paging stations); Notice at par. 141 (Part 22 931 MHz contour rules applied to 929 MHz licensing). While Section 22.537(f) defines larger contours for greater HAATs and/or ERPs, virtually all 900 MHz paging stations are authorized at the specified minimum. This means they have no engineering mechanism to reduce their predicted interference contour further.

⁴ This result would not occur with VHF or UHF paging, both of which use formulas to compute their interference contours. See Sections 22.537(d) and 22.567(d)&(f) of the Rules. In those bands, the license can achieve a permitted relocation by lowering its ERP slightly in the direction of the relocation, thus reducing its interference contour in that direction.

Precluding the development of 900 MHz paging systems -- even on an interim basis -- does not serve the public interest.

Accordingly, Filers respectfully request that the Commission adopt a processing policy for 900 MHz site modifications which would permit licensees to construct and expand their systems to provide better service to the public (as the Commission favors) without prejudicing the Commission's ability to auction currently unlicensed 900 MHz paging spectrum. In short, Filers propose a win-win modification policy.

c) The Commission's Policy on 929 MHz Exclusivity Must Conform With the Existing Rules. The Notice describes the Commission's existing rules for 929 MHz channel exclusivity as follows:

Under our current PCP exclusivity rules, applicants are granted conditional exclusivity when they are licensed, and permanent exclusivity is awarded when the licensee demonstrates that it has constructed and is operating a qualified system.

Notice at par. 148. Based on this analysis, the Commission then placed a freeze on its so-called "requests for ... permanent exclusivity...." Id. This analysis misstates the Commission's exclusivity rules, and is unlawful.

Specifically, Section 90.495(c) of the Rules states that a proposed 929 MHz paging system that meets the criteria for channel exclusivity "will be granted exclusivity ... at the time of initial licensing." In other words, Section 90.495 awards the licensee a vested right to channel exclusivity at the time of initial grant. Thus, for an exclusive 929 MHz license, there is no "request" for permanent exclusivity which the Commission might grant; the licensee's only obligation is to notify the Commission of the completion of construction so the condition can be marked as satisfied. Until the Commission

modifies Section 90.495, 929 Mhz paging licensees who timely construct and operate their systems must receive permanent exclusivity as a matter of right.

Respectfully submitted,

Diamond Page Partnerships I-XXI
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